United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1091

To Be Argued By:
JOEL MARTIN AURNOU
15 Minutes

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P/S

UNITED STATES COURT OF APPEA
SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

- against -

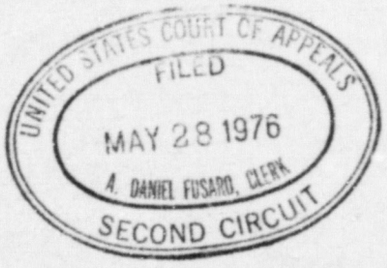
Docket No. 76-1091

RALPH CECCOLINI,

Appellee.

x

BRIEF AND APPENDIX FOR THE APPELLEE



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BRIEF (AND APPENDIX) FOR THE APPELLEE

PRELIMINARY STATEMENT

The United States of America herein claims an appeal as of right pursuant to 18 U.S.C. § 3731 and 28 U.S.C. § 1291, from an order of the Honorable Lee P. Gagliardi, United States District Judge of the Southern District of New York. The order appealed from was entered February 10, 1976 (Appellant's Appendix pages 10A - 21A). On that date, Judge Gagliardi announced that he acquitted the defendant on count 2 and found him guilty on count 1, but, without entering judgment, immediately set aside his verdict on count 1 granting defendant's motion upon the grounds that the evidence relied upon by the Court to convict the defendant upon count 1 was the unattenuated fruits of an illegal search. Bail was exonerated.

It is the position of the defendant that an appeal by the Government under the circumstances presented by this record, violates the double jeopardy clause of the United States

Constitution.

The defendant further contends that the Court below correctly suppressed the fruits of the illegal search.

THE FACTS

In 1973, the Federal Government conducted a gambling investigation in the North Tarrytown area (TR 301-08). Surveillance by FBI agents had included various businesses on Beekman Avenue which were frequently visited by Joseph Millow, including the flower shop itself. At no time during this period were the employees of any business enterprise located on that street questioned in regard to gambling activities. The surveillance was ultimately discontinued, in December, 1973 (TR 314).

On December 18, 1974, North Tarrytown Patrolman Ronald Biro, in uniform and on duty, entered the flower shop and proceeded through the area open to the public into the portion of the flower shop customarily used only by the employees. A young lady named Lois Hennessey was present, observed him enter and continued to read her newspaper. Ptl. Biro observed an envelope on the cash register from which allegedly protruded what appeared to be U. S. currency. He proceeded, without further ado or probable cause, to seize and search the envelope; removed and examined the contents and then interrogated Miss Hennessey concerning them (TR 99-103, 185-88, 199-203). In this way he then and there discovered the existence of Miss Hennessey as a person having knowledge that could be utilized

by the Government (TR 206-07). He replaced the envelope and its contents on the cash register, and left. The defendant, who was not present at the time, was not aware that there had been a search (TR 143). Within 24 hours, Ptl. Biro notified the North Tarrytown detectives (TR 203-04) who, in turn, notified FBI Agent Emory with whom they were then working jointly on a gambling investigation. Emory notified prosecutor Abzug (TR 374) and then interviewed Miss Hennessey specifically about the incident of December, 1974 (TR 363-64, 126-27; cf. 365-66). This interview occurred in or about April, 1975 (TR 373). Thereafter, in May, 1975, defendant was subpoenaed before the grand jury, at which he appeared without counsel, and was somewhat disingenuously advised that he was not a target of the investigation (TR 375)(See Point 4, Infra). He was, however, indicted immediately thereafter when his answers were at variance with those of Miss Hennessey.

In the over six months between the illegal search and defendant's grand jury testimony, not a single other employee of this or any other business located on Beekman Avenue had been interviewed or approached by the FBI. Subsequent to his indictment, other employees of the flower shop were, in fact, subpoenaed whose testimony was consistent with that of the defendant and inconsistent with that of Lois Hennessey.*

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* Jane Vitagliano began working at the flower shop on February 3, 1975 (TR 407) which was long after the December period inquired into by the grand jury. She testified over two months after Ceccolini's testimony and after his indictment as did each other flower shop witness, and her testimony was that Millow came in

(Continued on next page)

The defendant made various motions in preparation for trial and the Court held a conference and made its rulings in July of 1975. Over two months thereafter the Government finally complied on the eve of trial (Appellant's Appendix 1A). Its list of witnesses, contained the name of Ptl. Biro, who was immediately interviewed by the defense. Defendant then learned for the first time of the existence of a search (TR 17-18).

The Government had contributed in no small measure to the defendant's surprise. Completely aside from failing to advise the defendant of a search of his premises when he was not present and in the absence of a warrant or any conceivable probable cause, the Government took it upon itself to include in its discovery exhibits a certain envelope marked 12/31/74 which appeared to be, but was in fact not, the December envelope referred to in the grand jury testimony. Aside from its misleading appearance, it had absolutely no other significance on the outcome of the case.

When the defendant discovered the existence of the search, on the eve of trial, an immediate motion was made orally

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just to say hello (TR 410). She had never seen any gambling of any kind at the shop (TR 412). Cathleen Kosilla, a part time employee (TR 420-25) was also summoned to the grand jury after Ceccolini had been indicted (TR 428). She had seen no gambling at the store (TR 429). Roseanna Pesce who did work in the store in September and October of 1974 (TR 438) when Lois Hennessey did not work there (TR 438) was the wife of a New York City Police Sergeant (TR 437), had never been interviewed by the FBI, and saw absolutely no gambling (TR 439). Lois Hennessey was there only for a matter of minutes at 5 o'clock during these months (TR 438). Defendant's girl friend, Rosemary Albanese, brought to the grand jury in October after defendant's indictment (TR 165), saw absolutely no evidence of gambling at the flower shop (TR 172-73).

before Judge Gagliardi, who observed that the defendant could not have moved sooner because he had no knowledge of the search (TR 17-18). He directed that the hearing on the motion proceed simultaneously with the non-jury trial.

During the course of the trial, all of the testimony that related to the search and its fruits came from Government witnesses: Ptl. Biro, FBI Agent Emory, Detectives Spota and DeFalco and Miss Hennessey. Judge Gagliardi determined during the trial that the search was illegal (Appellant's Appendix 15A) and suppressed the results of the search. However, he also stated (Appellant's Appendix 20A), "I don't think it makes any difference as to when I passed upon the exclusion of the fruits of the search because it was clearly inadmissible". His Honor also stated that without the fruit of the illegal search, "there was insufficient evidence to say beyond a reasonable doubt that Ceccolini was guilty of count 1 charged in the indictment". (Appellant's Appendix 16A). The Court added that the remaining evidence, "standing by itself, it is insufficient to prove Ceccolini guilty beyond a reasonable doubt." Id.

Notwithstanding that the motion to suppress was made immediately prior to the trial, and then only because the Government had withheld the existence of the search from the Court and the defendant, the Court which heard both the motion and the trial jointly, purported to decide the merits first and the ruling on the motion to suppress only thereafter in connection with the motion to set aside the verdict.

In effect, the combined procedure of the Government and

the Court resulted in the defendant never having had a pre-trial or during trial suppression ruling beyond the Judge's post-verdict statement that he excluded the results of the search and that it made no difference when he passed upon the exclusion of the fruits of the search which were clearly not admissible. In the normal course of events, had the Judge suppressed prior to or during trial or prior to announcing his verdict, since the remaining evidence was clearly insufficient and so found by the Court, the defendant would have been entitled as a matter of right to an acquittal because of the insufficiency of the remaining evidence. Instead, the Court endeavored by the order of its rulings to create a right of appeal in the Government. It is respectfully submitted that the procedure utilized violates the double jeopardy clause.

The illegal search itself was described by both parties present (TR 66, 101-02, 184-85, 202). Patrolman Biro added that he had no prior knowledge of Hennessey as a possible witness and that he specifically learned that at and during the illegal search conducted by him on December 18, 1974 (TR 206-07). He testified that he notified his detectives within 24 hours. They testified that they notified FBI Agent Emory. Agent Emory testified that North Tarrytown Police notified him. Miss Hennessey stated that Agent Emory told her he got the information regarding her and the December incident from the North Tarrytown police (TR 111) and that he specifically asked her about the December incident (TR 125). She described it to him because she

knew he already had or could get that information from the North Tarrytown Police (TR 126). On the other hand, Miss Hennessey also testified that although it was football season and football tickets were hidden in the wax paper at the store, she did not show these to Ptl. Biro (TR 139040).

It was clear from all of the testimony summarized above that the search was:

a) without probable cause,

b) without a warrant,

c) without consent,

d) not incidental to a lawful arrest, and finally

e) conducted by a law enforcement officer on duty and in uniform, without justification and unlawfully.

It was equally clear that Miss Hennessey and her knowledge were the instant and immediate fruits of that search and the interrogation which took place as a part of that search (TR 102, 206, 111, 125-26). The Court below specifically found the search illegal and suppressed both the results of the search (Appellant's Appendix 19A) and the fruits of the search (Appellant's Appendix 20A). It then set aside the verdict on the first count as the remaining evidence was clearly insufficient to convict.

ARGUMENT

POINT I

Under the Circumstances of this Case The Double Jeopardy Clause Precludes A Government Appeal.

In the instant case the Court directed that the motion to suppress and the trial be heard together as allowed by Federal Rule 12 E. The Court specifically found that the search was illegal during the course of the trial (Appellant's Appendix 18A), excluded what were the results of the search (Appellant's Appendix 19A) and held that the fruits of the search also were clearly not admissible (Appellant's Appendix 20A). The Judge also expressly found that the Government's attention had not focused on Lois Hennessey prior to the illegal search (Appellant's Appendix 14A) and that the Government had not sustained its burden on the issue of inevitable discovery (Appellant's Appendix 15A). The Court below concluded that without her testimony there was insufficient evidence that Ceccolini was guilty of Count 1 and that the corroborating evidence standing by itself was insufficient to prove defendant's guilt beyond a reasonable doubt (Appellant's Appendix 16A).

Despite all of these findings which merited and warranted the Court in acquitting the defendant, that was not the procedure followed. The Court purported to consider all of the evidence including that which it suppressed although such evidence is inadmissible at the trial (Federal Rules of Criminal Procedure, Rule 41E). Based upon all of the evidence, legal and

illegal, the Court stated that it found Ceccolini guilty on Count 1 (Appellant's Appendix 11A) and then proceeded immediately to set aside its own verdict on the grounds that it could not stand without the illegal suppressed evidence, and exonerated bail (Appellant's Appendix 16A).

It is respectfully submitted that the Court below should have determined the motion to suppress at the close of the Government's case in chief. This is so because at that point in the trial the defendant could obtain a fair ruling on his motion to dismiss only if the Court determined which evidence it was that could be relied on by the Government to defeat that motion. This is even more clearly so at the close of all the evidence since the Court is unquestionably at that point in possession of all the factual information relative to the issue of suppression and only that which is not entitled to be suppressed can properly be considered on behalf of the Government in opposition to the motion to dismiss at the close of all the evidence. Again, the Court below inexplicably did not do this. Rather, the District Judge deliberately structured his ruling in such a way that the defendant never received at trial the benefits of the granting of his pre-trial suppression motion. This is particularly unfair since any delay in making the motion was due to the Government and to failure to disclose the existence of the search and not to any inaction, fault or delay on the part of the defendant.

The Government did not utilize the notice provision

of Federal Criminal Rule 12D (1). Rather than disclose to the defendant that there had been a search of which he was totally unaware (TR 143), the Government initially took the position in its memorandum that

> "Until the trial, the Government was not concerned about a 'taint problem' because it believed Biro's search to be lawful" (Government's memorandum of Law, page 11)

At the trial, however, the Government utterly abandoned any argument that the search was consented to when the testimony of its own police witnesses and of Miss Hennessey clearly established otherwise. The Government did not recognize its obligations to turn over Brady material which this clearly was. Perhaps most egregiously, it delayed complying with the pretrial discovery order of Judge Gagliardi until the week before trial, so that it was not until the eve of trial that defendant's counsel, interviewing Ptl. Biro*, first learned of the existence of the search. The Court expressly recognized that the defendant could not because of this fact pattern have moved against the search sooner (TR 17-18). The case is thus similar, if not analogous, to U. S. v. Lucido, 517 F 2d, 1 (6th Cir. 1975) in which case the 6th Circuit ruling on an analogous fact pattern held that the double jeopardy clause precluded review.

The leading cases in this area are the recent Supreme Court decisions in U. S. v. Jenkins, 420 U.S. 358 (1975) and

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* Up to the eve of trial when Patrolman Biro's name was included on the witness list provided by the Government, the defense had no idea of his existence or relevance, or of the fact that a physical search had taken place.

U. S. v. Wilson, 420 U. S. 332 (1975). It is submitted that because of the unique fact pattern of this case, it falls within the Jenkins rather than the Wilson rule, although superficially it may appear similar to Wilson. Were the Court to entertain jurisdiction in this case, in the event of a reversal, before the verdict of guilty could be reinstated, new, different and additional findings of fact would be required with regard to the illegality of the search, the attenuation of the taint, and admissibility of the tainted testimony. The case would then come within the rule of U. S. v. Fayer, 523 F 2d,661 (2d Cir. 1975). See also U. S. v. Jaramillo 510 F 2d, 808 (8th Cir. 1975); U. S. v. Robbins 510 F 2d, 301 (6th Cir. 1975); and U. S. v. Sorenson 504 F 2d,406 (7th Cir. 1974). The Government is not seeking to appeal solely on a question of law, but rather from the resolution of fact issues at trial which resulted in defendant's discharge. However denominated, the defendant was in reality acquitted by the trial court's resolution of disputed fact issues in his favor. The double jeopardy clause makes that ruling final.

While it is virtually unheard of for a motion to suppress evidence based on an illegal search to be decided after trial, that fact pattern has occurred in several cases in the 10th Circuit where recent Supreme Court decisions on border searches made necessary a post verdict re-hearing on the issue of suppression. In each of those cases, the 10th Circuit has held unanimously that no appeal lies from the dismissal entered

after a finding of guilty. Upon the Government's petition for re-hearing or re-hearing en banc, that application was denied without a single Circuit Judge in active service requesting that the Court be polled on re-hearing enbanc. Although these cases are not officially reported, counsel has obtained copies of the opinions of the 10th Circuit. They are annexed hereto as Respondent's Appendix Exhibits "A" (U. S. v. Morrison), "B" (U. S. v. Rose) and "C" (U. S. v. Kopp). The opinions on petition for re-hearing are annexed as Exhibits "D" (Morrison) "E" (Rose) and "F" (Kopp).

It is respectfully submitted that in the unique factual pattern of the instant case the double jeopardy clause is offended by the Government's appeal and that pursuant to the decisions in Jenkins and Fayer, and in each of the 10th Circuit cases, the appeal should be dismissed.

POINT II

The Trial Court Properly Suppressed Testimony of Lois Hennessey

The trial court's findings that the December search was illegal, that witness Hennessey was discovered directly as a result of and in the course of that search and that the information was immediately conveyed to the local police and to the FBI can hardly be disputed. It was established entirely by the testimony of the Government's witnesses. It is entirely false and misleading to suggest* that an on-going Federal gambling investigation involving contacts with various flower shop employees, was occurring at any time prior to defendant's grand jury testimony. In fact, FBI Agent Emory testified that his surveillance in the area had been terminated a year before. In six months the FBI had made no contacts with any employees of any enterprise for fear of tipping off those surveyed (TR 386). In December of 1974, and in February of 1974, no employees of any enterprise had been contacted. In February of 1974, Miss Hennessey terminated her employment at the flower shop (TR 60) and was not in an employee status when contacted by the FBI (TR 108). No other employees or ex-employees were ever contacted by the FBI until after the defendant had been indicted. Even then, no other employee of any other business enterprise in the area was ever contacted. In short, the FBI had a purposeful policy to avoid

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* Government's Brief, heading of Point I.

contacting such people for fear of compromising the investigation. When Agent Emory attempted to suggest that he might ultimately, in the future, after exhausting other avenues, have made contact with an employee he was very clearly talking about an employee still within the store to inform the FBI of current developments (TR 386). Miss Hennessey did not fit that description. None of the people who did fit it were contacted until after indictment, and they furnished the Government with no helpful information. Judge Gagliardi found, and his conclusion is not merely supported but compelled by the record, that Miss Hennessey's testimony was the direct result of the illegal search (Appellant's Appendix 14A - 16A)(TR 206-07, 111, 125, 126).

It is also some what disingenuous to suggest that "the Government" had no knowledge of the illegality of the search since the "silver platter" doctrine renders the knowledge of the local police who reported the information to the FBI, chargeable to the FBI. It is also somewhat incredulous to say that the Government had no knowledge of the illegality since Lois Hennessey's description of the search (TR 66, 102) made clear the illegal manner in which it occurred. Patrolman Biro was equally candid about that (TR 184-85, 202).

The Government attempts to argue that the Hennessey testimony was somehow free of the taint of the manner in which she was discovered. It is clear that she was discovered solely and directly as a result of the search (TR 206-07). It is also clear that that fact, and that fact alone, relayed from the police to the FBI and the prosecutor, led to the FBI interview

with Miss Hennessey (TR 206-07, 364, 392-93). It is clear that she answered Biro originally after he confronted and interrogated her with the illegally seized evidence in his hand at a time and place where he was in uniform and she was constrained by the circumstances to answer his questions but not to volunteer information (TR 139-40). Miss Hennessey also testified that she answered Agent Emory's questions because she knew that he had or could get the information inquired about from the North Tarrytown police(TR 126). This is hardly an act of free will divorced from the illegal search. Rather, it is so closely aligned with the search that it might properly be called the results, rather than the fruits, of the illegal search.

Wong Sun v. United States, 371 U.S. 471, 486 (1963) is authority for excluding verbal evidence derived from an illegal search. The Court states at 371 U.S. at 485,

> "verbal evidence which derives so immediately from an unlawful entry and an unauthorized arrest ... is no less the 'fruit' of official illegality than the more common tangible fruits of the unwarranted intrusion."

At page 486, the Court added:

> "Nor do the policies underlying the exclusionary rule invite any logical distinction between physical and verbal evidence. Either in terms of deterring lawless conduct by federal officers, Rea v. United States, 350 U.S. 214, 76 S. Ct. 292, 100 L. Ed. 233, or of closing the doors of the federal courts to any use of evidence unconstitutionally obtained, Elkins v. United States, 364 U.S. 206, 80 S. Crt. 1437, 4 L. Ed. 2d 1669, the danger in relaxing the exclusionary rules in the case of verbal evidence would seem too great to warrant introducing such a distinction."

In U. S. v. Brignoni-Ponce, 422 U. S. 873, 876 n. 2 (1975) the Supreme Court expressly did not address itself to the suppression of voluntary testimony. The case there cited, U.S. v Guana-Sanchez, 484 F 2d 590 (7th Cir. 1973) expressly held that such testimony should, in fact, be suppressed. That is the rule in this Circuit, U.S. v. Tane, 329 F 2d 848 (1964). See also U.S. v. Karathanos, Dkt. No. 75-1322 (2d Cir. 2/2/76). In U. S. v. Marder, 474 F. 2d 1192, 1195 (1973), the 5th Circuit stated

> "This circuit has followed the general rule that if the identity of a government witness and his relationship to the defendant are revealed because of an illegal search and seizure, the testimony of such witness must be excluded."

The Court added, at page 1196, that unless this testimony were attenuated so as to remove the taint,

> "Any other conclusion would be totally inconsistent with the fundamental purpose of the exclusionary rule; to instill respect in government officers for a citizen's fourth amendment rights."

See also Williams v. U. S., 382 F. 2d 48 (5th Cir., 1967), citing with approval this circuit's decision in Tane. As we will show in Point III, there was no attenuation in this case.

In support of its position, the Government cites cases involving express consent, abandoned property, a warrant with sufficient untainted probable cause and other cases which are totally inapt. Here, as in U.S. v. Karanthanos, supra, the official misconduct was both flagrant and deliberate, and the closeness between the original illegality and the witness'

testimony is as clear in this case as it is possible to be upon an issue where the information rests entirely within the province of Government Agents and Government witnesses. Biro knew he had no right to search and therefore, replaced the material seized so as to cover up the tracks he had no right to leave in the first place. But first, he utilized the results of the search to interrogate and discover Miss Hennessey, thereby compounding the intrusion. He looked into the envelope because of suspicion as to what it might contain, and that is the essence of purposeful, deliberate and flagrant official misconduct. Certainly, he did not hesitate to exploit the results of his illegal search.

A fair and careful review of this record establishes that the District Judge was well within the realm of the trier of the facts in concluding as he did that the search was illegal, that Miss Hennessey's testimony was the fruits of that illegality, and that it was required to be suppressed. His decision in this regard should, in all respects, be affirmed.

POINT III

The Government Totally Failed to Establish That Lois Hennessey's Testimony Would Have Been Discovered Absent the Illegal Search.

As the prevailing party on this issue, the defendant is clearly entitled to the benefit of every favorable inference drawn by the trial Court which is fairly within the province of the evidence in the record. That evidence showed that the illegally obtained information was sufficient to, in and of itself, and, in fact, did in this case trigger this type of investigation. More specifically, the FBI had never previously contacted the employees of any of the other business premises to which Joe Millow, the suspected gambler, went during his walks down Beekman Avenue. Agent Emory specifically contacted Lois Hennessey as a direct result of the illegal search. The FBI never contacted any other employee of the flower shop until after the defendant testified and never contacted any employee of any other business on Beekman Avenue at all, ever.

Miss Hennessey was specifically contacted at, and later in regard to, the December 18th incident. Her testimony relative to the defendant was a direct fruit of these inquiries. The evidence produced was far from the normal output of the investigation as it had been conducted up to, and after, the December incident. Indeed, it can be fairly said that the December search totally and radically altered the procedure used in this investigation, with regard to this defendant, so that it differed radically from every single other surveillance

of business premises conducted on the same street during the same investigation by the same FBI agents.

The test in this circuit and elsewhere has never been whether it is conceivable that the Government might through some unspecified fortuitous circumstance have stumbled across Miss Hennessey at some value unspecified time in the future. Rather, the test is that where it is clearly established through the Government's own witnesses that the illegal search was the actual source of the Government's information, and that prior to this illegal search the Government's attention had not focused on her in that capacity, the Government must bear the burden of establishing that Miss Hennessey's testimony would have been both discovered and procured in the normal course of its investigation. U.S. v. Falley, 489 F. 2d 33 (2 Cir. 1973). U.S. v. Paroutian, 299 F. 2d 486 (2 Cir. 1962); U.S. v. Schipani, 414 F. 2d 1262 (2 Cir. 1969); U.S. v. Tane, 329 F. 2d 848 (2 Cir. 1964). The entire past and subsequent history of that investigation indicated exactly the contrary. No attempts were even made to interview employees for fear of tipping off those being surveilled (TR 386). This was true in 1973 as well as 1974. It has never been departed from in this entire investigation, except in this one instance.

Special Agent Emory attempted to ease the prosecution over this hurdle. He testified that at some vague time in the future, if all else failed, he would look for someone (unspecified) that might give all that information without compromising the investigation. (See TR 386, 395) Obviously, by these words he

indicated his wariness of advising the defendant.* If that failed, he thought that, at some future time thereafter, he might try "to get an employee in the store that would be an agent, acting as a source of information for the Government" (TR386). Perhaps. But this avails the Government naught. Lois Hennessey was interviewed for the first time months after she had ceased to be a part time employee (TR 60, 108). No other employee of the shop was then interviewed, or had any information of value to the FBI. The only other ex-employee, Mrs. Pesce, the wife of a New York City Police Sergeant (TR 437), was never interviewed by, or apparently known to, the FBI. It simply never crossed Agent Emory's mind to go looking for any past employees until, as a direct result of the illegal search, he sought out Miss Hennessey to obtain the details of that incident.

The Court below was clearly not unjustified in finding her testimony to be the unattenuated fruits of the illegal search. This is particularly so in light of her testimony that she described the December incident because the FBI agent told her that he had gotten her name from the North Tarrytown Police Department and she knew that he either already had the information or could get it from the North Tarrytown Police (TR 126-27).

The only evidence offered by the Government to avoid the obvious failure to question employees in both the 1973 and 1974 investigations was the subpoenaing of other flower shop

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* At that point the investigation had focused on Millow and each of the stops he made. It had not singled out the flower shop alone.

employees after the defendant's indictment, and the vague intentions of Agent Emory regarding employees in the future. This is far short of the showing required by the cases cited in Appellant's brief. In U.S. v. Capra, 501 F. 2d 267, 280 n. 12 (2 Cir. 1974), 16 months had elapsed since the illegal wiretap and the Government had an independent untainted source of probable cause for 8 months prior to the search. In U.S. v. Cole, 463, 172 (2 Cir. 1972) a saturation investigation of the particular defendant based on independent information of VAST SUMS OF CASH CONCEALED from the Government was involved. In addition, that case involved the sustaining of findings of fact in favor of the Government. Here the Court found against the Government and the record supports, if not compels, that result. In U.S.v. Friedland, 441 F. 2d 855 (2 Cir. 1971), the Government proved that it had come upon defendant from sources unrelated to the illegal wiretap. 441 F. 2d at 857. Again, in that case, this Court affirmed findings of fact in favor of the Government made by the trial court. Virgin Islands v. Gereau, 502 F. 2d 917, 927-28 (3 Cir. 1974) involved a massive saturation search already underway for a specific physical object known to police to be in a specific area. The Court held that a trial finding that it would have been discovered without the suppressed statement was not "clearly erroneous". The trial courts finding in this case, in favor of defendant on this issue, is likewise not clearly erroneous and should similarly be sustained. In U.S. v. Evans, 454 F. 2d 813, 818-19 (8 Cir. 1972), the Court approved exclusion where there

was no independent source and "The illegality directly led to the identity of the otherwise unknown witness without intervening factors of an attenuating character". Id. at 818. In that case the court stated

> "Those cases which do not exclude the live testimony generally involve situations where the illegality did not directly result in learning the name of the informant used as a witness at the trial, or where there were substantial attenuating circumstances or an independent source."

That is the opposite of the fact pattern disclosed by this record. Thus, the cited cases are not supportive of the Government's position because factually they are all significantly different and distinguishable.

Here there was a total failure on the part of the Government to meet the burden of establishing either that this Hennessey's testimony was not sufficient to trigger the type of investigation which led to her, or that she would have been the normal output of the investigation conducted prior to the illegal search. U. S. v. Falley, 489 F. 2d 483 (2 Cir. 1973). U.S. v. Paroutian, 299 F. 2d 486 (2 Cir. 1962); U. S. v. Schipani, 414 F. 2d 1262 (2 Cir. 1969); U. S. v. Tane, 329 F. 2d 848 (2 Cir. 1964).

A fair and careful review of this record establishes that the District Judge was well within the realm of the trier of the facts in concluding as he did that the Government failed to meet its burden on the issue of attenuation. His decision in this regard should, in all respects, be affirmed.

POINT IV

Upon The Facts Disclosed In This Record, The Unattenuated Fruits of The Illegal Search Should Not Be Admitted.

Attempting to raise in this Court for the first time a contention it did not make below, the Government argues that policy considerations should nevertheless dictate the admission of illegal and unattenuated evidence in a perjury prosecution where, contrary to the fact patterns in the cases which it cites*, the defendant was not aware at the time of his grand jury appearance that the illegal search had taken place.

Under normal rules were a defendant to fail to raise such a point it would be deemed waived. We respectfully urge that this rule should be equally applicable to the Government and that this should be dispositive of this issue. Notwithstanding this, because we believe that the fact pattern in the instant case discloses significant distinctions between the cited cases and this one which indicate clearly circumstances which rise to the level of entrapment and which are also offensive to fundamental concepts of fair play embodied in the due process clause, we submit the following argument upon the merits of this contention.

Following the clearly illegal search, the Government directly and immediately obtained, without the intervention of

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* United States v. Turk, 526 F. 2d 654, 667 (5th Cir. 1976); Unites States v. Raftery, Dkt. No. 75-2021 (9th Cir. 4/12/76)(slip opinion at page 5).

any independent source, in a manner completely different from its normal investigation, the testimony of Miss Hennessey. The Court below found that "prior to the search the Government's attention did not focus on her in that capacity." (Appellant's Appendix, page 14A). Thereafter, the defendant was called before the grand jury and interrogated on the basis of her information (TR 375) (without which the District Court held he could not have been convicted (Appellant's Appendix 16A). He appeared without counsel.* He was given no warning of his right to counsel. He was given no warning of his privilege against self-incrimination. He was neither advised nor aware that the illegal search had taken place. The prosecutor substantially disarmed him by advising that he was not a target of the investigation (grand jury minutes, page 38) (Respondent's Appendix, page A-1). This was the only advice he received from the prosecutor. By contrast, other witnesses in this same investigation were warned specifically of their right to counsel, and of the privilege against self-incrimination, and were not given any disarming advice that they were not targets of the investigation, even when in fact they were not such targets.** This sequence of events, which resulted in the

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* Compare U.S. v. Mingoia 424 F. 2d 710, 713 714 (2 Cir. 1970)
U.S. v. Corallo 413 F. 2d 1306, 1328 (2 Cir.) cert. denied 396 U.S. 958 (1969)
U.S. v. Irwin 354 F. 2d 192, 199 (2 Cir. 1965) cert. denied 383 U.S. 967
U.S. v. Pepe 367 F. Supp. 1365 (Conn. 1973)

** At trial the 3500 material turned over by the Government showed, for example, that Miss Albanese, who appeared with counsel, was specifically warned of her privilege against self-incrimination and her right to counsel but received no statement that she was not a target of the investigation.

defendant's immediate indictment, does not eliminate the suggestion of a sophisticated, calculated abuse of the grand jury. See U.S. v. Mandujano, 19 CrL 3087, 3097 (text preceding footnote 11) U.S. Supreme Court, May 19, 1976)(Brennan, J., concurring).

It is particularly noteworthy that in the two cases cited by the prosecution for the proposition that such evidence should be admitted, the 5th and 9th Circuit Courts of Appeal took pains to point out that the situation might be very different if the defendant did not know prior to the grand jury of the illegal search. U.S. v. Turk, 526 F. 2d. 667 at note 39; U.S. v. Raftery, supra, slip opinion at page 5, note 7. As the 5th Circuit observes,there would be a deterrent value in prohibiting the surprise use of illegally seized evidence to obtain a perjury conviction.

It would seem that this is a classic entrapment situation. The defendant had no pre-disposition to go to the grand jury. He was there uncounseled, under compulsion of a Federal subpoena. He did not choose the subject matter of his interrogation or its time or place. He was clearly unaware that his constitutional rights under the 4th amendment had been violated. This was the basis upon which the prosecutor chose not to fairly apprise him of his situation but, rather, to steer him toward the shoals of a perjury indictment as he sat blindfolded, disarmed, uncounseled and unwarned in the grand jury.

This fact pattern is a far cry from those underlying the Turk and Raftery decisions in each of which the defendant

sought to take advantage of his knowledge that the search was illegal. A fair balance struck between the competing interests cannot allow the Government to play its cards as close to the vest as it did here and then allow it to turn around and request of this Court the right to violate the defendant's rights just one more time. Doubly so, where the evidence is introduced as part of the Government's direct case, and is the only evidence upon which a conviction may be based. In our view that procedure reeks of star chamber abuse. No case has gone so far as to sanction such a result and none should.

> "Courts which sit under our constitution cannot and will not be made party to lawless invasion of the constitutional rights of citizens by permitting unhindered Governmental use of the fruits of such invasions." Terry v. Ohio, 392 U.S. 1, 12-13 (1968)

In cases where official conduct is flagrantly abusive of 4th amendment rights, the deterrent value of the exclusionary rule is most likely to be effective. The corresponding mandate to preserve judicial integrity most clearly demands that the fruits of official misconduct be denied in this case. See, Brown v. Illinois, 422 U.S. 590 (1975).

The illegally obtained evidence should not as a matter of constitutional due process as well as supervisory powers of the Federal Courts be admitted in this case.

CONCLUSION

For the reasons herein set forth, the appeal should be dismissed for lack of jurisdiction or, in the alternative, the order of the District Court should be affirmed.

Respectfully submitted,

GREENSPAN & AURNOU
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JOEL MARTIN AURNOU
Of Counsel

RALPH CECCOLINI, called as a witness, having been duly sworn by the Forelady of the Grand Jury, testified as follows:

BY MR. ABZUG:

Q State and spell your name, please.

A C-e-c-c-o-l-i-n-i.

Q First name?

A Ralph.

Q And that's pronounced Ceccolini?

A Ceccolini, Ceccolini.

Q Where do you live, Mr. Ceccolini?

A 95 Beekman Avenue, North Tarrytown.

Q When were you born?

A May 19th, 19731.

Q Are you married?

A Divorced.

Q Any children?

A Two girls.

Q Mr. Ceccolini, you have been subpoenaed before this Grand Jury to testify in connection with certain violations of Federal Law, particularly those laws concerning gambling.

I would like to advise you at this time that you are not a target of the investigation.

Mr. Ceccolini, how are you employed?

A I own a flower shop, and I'm a correction officer.

Q Is this flower shop named Sleepy Hollow Flower Shop, on Beekman Avenue?

A Yes, it is.

Q What's the address there?

A 52 Beekman Avenue.

Q And who else is employed besides yourself at the Sleepy Hollow Flower Shop?

A Well, I have a girl friend or a fiance, whatever you want to call her. She helps me in the store.

Q When did she start helping you?

A Three years ago.

Q What's her name?

A Rosemary Albanese.

Q Could you spell the last name, please?

A A-l-b-a-n-e-s-e.

Q Do you know where she lives?

A A 110 Draver Lane, Dobbs Ferry.

Q Apart from yourself and your fiance, is anybody else working at the flower shop?

A No. There's a few young girls from the high school that help me out. I mean, they come in, they are learning the business. They are not employed, but they, you know, come down and help me out, make deliveries for me, stuff

United States Court of Appeals, Tenth Circuit

No. 74–1768

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

KENNETH MORRISON, DEFENDANT-APPELLEE

[Filed November 6, 1975]

Appeal from the United States District Court for the District of New Mexico (D.C. No. 24882-CR)

Before: Hon. JOHN C. PICKETT, United States Senior Circuit Judge, and Hon. OLIVER SETH and Hon. ROBERT H. MCWILLIAMS, Circuit Judges.

Per Curiam

Appellee Morrison was found guilty of a violation of 21 U.S.C. 841(a)(1) following a trial to the court. However, a formal judgment of conviction was never entered. Instead, the district court reconsidered its earlier denial of defendant's motion to suppress certain evidence and, in the wake of the hearing required by our mandate in United States v. King, 485 F.2d 353 (10th Cir. 1973), granted the motion to suppress. The government now appeals that order under the provisions of 18 U.S.C. 3731. The validity of the searches by which the contraband was discovered was of critical importance in both *King* and this case. The facts of these cases were substantially similar and the resolution, adverse to the government, of the search

EXHIBIT "A"

issue on remand in *King* was apparently deemed to be applicable in this case.

The government has moved to summarily reverse the district court's suppression order. However, before reaching the merits of any issues related to that motion, we are obligated to first consider the threshold question of this court's jurisdiction. As a general rule, the United States has no right of appeal in criminal cases, absent express statutory sanction. United States v. Hines, 419 F.2d 173 (10th Cir. 1969). Under § 3731, the government may appeal from an order of a district court suppressing or excluding evidence, provided that such order was ". . . not made after a defendant has been put in jeopardy or before the verdict or finding on the indictment or information . . .". Simply stated, § 3731 clearly and expressly precludes a government appeal "where the double jeopardy clause of the United States Constitution prohibits further prosecution.

Unquestionably, the defendant has been placed once in jeopardy and any further proceedings would necessarily involve the "resolution of factual matters going to the elements of the offense charged, . . .". *See,* United States v. Jenkins —— U.S. ——, 95 S.Ct. 1006 (1975). Under these circumstances, to subject the appellee to further proceedings would be to do substantial violence to the double jeopardy clause. We must therefore conclude that the government has no right of appeal in this case and that purported appeal must be dismissed for lack of jurisdiction. In view of the disposition of this case, the merits of the government's motion to summarily reverse need not be reached.

Appeal dismissed.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellant, vs. RALPH ALLAN ROSE, Defendant-Appellee.	)	No. 74-1769

Filed: November 6, 1975

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO
(D.C. NO. 25014-CR)

Before Honorable John C. Pickett, United States Senior Circuit Judge, and Honorable Oliver Seth and Honorable Robert H. McWilliams, Circuit Judges

EXHIBIT "B"

PER CURIAM

Appellee Rose was found guilty of a violation of 21 U.S.C. 841(a)(1) following a trial to the court. However, a formal judgment of conviction was never entered. Instead, the district court reconsidered its earlier denial of defendant's motion to suppress certain evidence and, in the wake of the hearing required by our mandate in United States v. King, 485 F.2d 353 (10th Cir. 1973), granted the motion to suppress. The government now appeals that order under the provisions of 18 U.S.C. 3731. The validity of the searches by which the contraband was discovered was of critical importance in both *King* and this case. The facts of these cases were substantially similar and the resolution, adverse to the government, of the search issue on remand in *King* was apparently deemed to be applicable in this case.

The government has moved to summarily reverse the district court's suppression order. However, before reaching the merits of any issues related to that motion, we are obligated to first consider the threshold question of this court's jurisdiction. As a general rule, the United States has no right of appeal in criminal cases, absent express statutory sanction. United States v. Hines, 419 F.2d 173 (10th Cir. 1969). Under §3731, the government may appeal from an order of a district court suppressing or excluding evidence, provided that such order was " . . . not made after a defendant has been put in jeopardy or before the verdict or finding on the indictment or information . . .". Simply stated, §3731 clearly and expressly precludes a government appeal "where the double jeopardy clause of the United States Constitution prohibits further prosecution."

Unquestionably, the defendant has been placed once in jeopardy and any further proceedings would necessarily involve the "resolution of factual matters going to the elements of the offense charged, . . . ". *See,* United States v. Jenkins, U.S. , 95 S.Ct. 1006 (1975). Under these circumstances, to subject the appellee to further proceedings would be to do substantial violence to the double jeopardy clause. We must therefore conclude that the government has no right of appeal in this case and that purported appeal must be dismissed for lack of jurisdiction. In view of the disposition of this case, the merits of the government's motion to summarily reverse need not be reached.

Appeal dismissed.

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NOT FOR ROUTINE PUBLICATION

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT,	)	
vs.	)	NO. 74-1765
JOHN DAVID KOPP, DEFENDANT-APPELLEE.	)	

Filed : November 6, 1975

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO
(D.C. NO. 25019CR)

Before Honorable John C. Pickett, United States Senior Circuit Judge and Honorable Oliver Seth and Honorable Robert H. McWilliams, United States Circuit Judges

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PER CURIAM

Following a trial to the court, Appellee Kopp was found guilty of a violation of 21 U.S.C. §841(a)(1). However, a formal judgment of conviction was never

entered. Instead, the district court dismissed the indictment apparently as a consequence of the evidentiary hearing required by our mandate in United States v. King, 485 F.2d 353, (10th Cir. 1973).

Central to both cases was the validity of the respective searches by which the contraband underlying defendants' prosecution was discovered. The facts critical to the resolution of the search issue in these cases were substantially similar and the district court's determination on remand, adverse to the government, in *King* was deemed to be applicable to this case.

Following the dismissal of the indictment in this case, the government promptly sought appellate review pursuant to 18 U.S.C. §3731. Essentially §3731 provides a right of appeal by the government in criminal prosecutions whenever the constitution permits. The statute, however, expressly precludes a government appeal "where the double jeopardy clause of the United States Constitution prohibits further prosecution". The pivotal question then, with respect to our jurisdiction, is whether any further proceedings in this case required by a potential remand would be impermissible under the double jeopardy clause of the constitution.

As we view it, the only consequence of a reversal by this court would be to retry the defendant. Unquestionably, the defendant has been placed once in jeopardy and further proceedings would necessarily involve a "resolution of factual issues going to the elements of the offense charged. . .". *See,* United States v. Jenkins, U.S. , 95 S.Ct. 1006 (1975). To subject appellee to further proceedings of this nature would be to violate the double jeopardy clause. Under these circumstances, we conclude that the government has no right of appeal and we must therefore dismiss the purported appeal for lack of jurisdiction.

In view of this disposition, the merits of the government's motion to summarily reverse need not be reached.

Appeal dismissed.

EXHIBIT "C"

JANUARY TERM—FEBRUARY 24, 1976

Before Hon. David T. Lewis, Chief Judge, Hon. John C. Pickett, Senior Circuit Judge, Hon. Delmas C. Hill, Hon. Oliver Seth, Hon. William J. Holloway, Jr., Hon. Robert H. McWilliams, Hon. James E. Barrett and Hon. William E. Doyle, Circuit Judges.

No. 74-1768

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

KENNETH MORRISON, DEFENDANT-APPELLEE

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing en banc in the captioned case.

Upon consideration whereof, the petition for rehearing is denied by the circuit judges, Pickett, Seth, and McWilliams to whom the appeal was submitted. In our view, the Supreme Court's decision in United States v. Jenkins, 420 U.S. 358, (1975) controls in this case and not United States v. Wilson, 420 U.S. 322 (1975) as suggested by the government.

The petition for rehearing having been denied by the panel to whom the appeal was submitted and no member of the panel or judge in regular active service on the court having requested that the court be polled on rehearing en banc, the suggestion for rehearing en banc is denied. Rule 35, Federal Rules of Appellate Procedure.

HOWARD K. PHILLIPS,
Clerk.

EXHIBIT "D"

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UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JANUARY TERM - FEBRUARY 24, 1976

Before the Honorable David T. Lewis, Chief Judge, The Honorable John C. Pickett, Senior Circuit Judge, The Honorable Delmas C. Hill, The Honorable Oliver Seth, The Honorable William J. Holloway, Jr., The Honorable Robert H. McWilliams, The Honorable James E. Barrett and The Honorable William E. Doyle, Circuit Judges

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellant,	)	
	)	
vs.	)	No. 74-1769
	)	
RALPH ALLAN ROSE,	)	
	)	
Defendant-Appellee.	)	

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing *en banc* in the captioned case.

Upon consideration whereof, the petition for rehearing is denied by the circuit judges, Pickett, Seth, and McWilliams to whom the appeal was submitted. In our view, the Supreme Court's decision in United States v. Jenkins, 420 U.S. 358, (1975) controls in this case and not United States v. Wilson, 420 U.S. 322 (1975) as suggested by the government.

The petition for rehearing having been denied by the panel to whom the appeal was submitted and no member of the panel or judge in regular active service on the court having requested that the court be polled on rehearing en banc, the suggestion for rehearing en banc is denied. Rule 35, Federal Rules of Appellate Procedure.

/s/ Howard K. Phillips

HOWARD K. PHILLIPS, Clerk

EXHIBIT "E"

JANUARY - FEBRUARY 24, 1976

Before The Honorable David T. Lewis, Chief Judge, The Honorable John C. Pickett, Senior Circuit Judge, The Honorable Delmas C. Hill, The Honorable Oliver Seth, The Honorable William J. Holloway, Jr., The Honorable Robert H. McWilliams, The Honorable James E. Barrett and The Honorable William E. Doyle, Circuit Judges

UNITED STATES OF AMERICA PLAINTIFF-APPELLANT,	)	
VS.	)	NO. 74-1765
JOHN DAVID KOPP, DEFENDANT-APPELLEE.	)	

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing en banc in the captioned case.

Upon consideration whereof, the petition for rehearing is denied by the circuit judges, Pickett, Seth, and McWilliams to whom the appeal was submitted. In our view, the Supreme Court's decision in United States v. Jenkins, 420 U.S. 358, (1975) controls in this case and not United States v. Wilson, 420 U.S. 322 (1975) as suggested by the government.

The petition for rehearing having been denied by the panel to whom the appeal was submitted and no member of the panel or judge in regular active service on the court having requested that the court be polled on rehearing en banc, the suggestion for rehearing en banc is denied. Rule 35, Federal Rules of Appellate Procedure.

EXHIBIT "F"

/s/ Howard K. Phillips

HOWARD K. PHILLIPS, Clerk

STATE OF NEW YORK)
) SS.:
COUNTY OF WESTCHESTER)

Anne Watkins, being duly sworn, deposes and says:

That deponent served the within brief and Appendix for the Appellee on Pete Sudler, Esq., United States Attorney's Office 1 St. Andrews Plaza, New York, New York 10007, the address designated by said attorney for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Postal Service within New York State.

Anne Watkins

Sworn to before me this
28th day of May, 1976.

Phyllis J. Troy

PHYLLIS J. TROY
Notary Public, State of New York
No. 60-4522724
Qualified in Westchester County
Commission Expires March 30, 1977